



Linda S. Adams
Secretary for
Environmental Protection

State Water Resources Control Board

Division of Water Rights

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JUN 08 2009

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Lance Johnson, General Manager
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12152 Road 28 1/4
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Dear Ms. Brenner and Mr. Johnson:

U.S. BUREAU OF RECLAMATION'S HIDDEN DAM PERMIT 16584 (APPLICATION 18733) ON
THE FRESNO RIVER AND CONVERTING PRE-1914 ENTITLEMENTS OF THE MADERA
IRRIGATION DISTRICT TO STORAGE

The State Water Resources Control Board (State Water Board), Division of Water Rights (Division) has received Barbara Brenner's March 26, 2009 letter responding to the U.S. Bureau of Reclamation's (Bureau) March 13, 2009 letter to Lance Johnson, General Manager of Madera Irrigation District (District). The March 13, 2009 letter requests clarification of the water stored in Hensley Lake, which is formed by Hidden Dam. This letter comments on the March 26, 2009 letter, which states the following:

1. Neither State Water Board Order 99-001 nor the District's Hidden Unit Water Service Contract with the Bureau implicates or prevents Big Creek waters from flowing through, or being temporarily stored at Hensley Lake.
2. Under Pre-1914 rights, a water right holder can change the point of diversion, place of use, or character of use provided that the legal water rights of others are not injured.
3. The District's Soquel water supply is not diverted to the Fresno River.
4. There is no evidence, nor can there be, of any injury to other water users resulting from the District's temporary storage of its Big Creek supplies.
5. The low-flow outlet at Hidden Dam is inoperable such that the District's water cannot flow through the facility at this time.

The Madera County Superior Court has quantified the District's Big Creek and North Fork Willow Creek (via the Soquel ditch) entitlements. Pursuant to California Water Code Section 5100 et seq, the District has claimed these entitlements by filing Statements of Water Diversion and Use (No. 12547 and 14187) and Supplemental Statements of Water Diversion and Use with the State Water Board.

Item 1 above asserts that neither State Water Board Order 99-01 nor the District's service contract restricts the temporary storage of Big Creek water in Hensley Lake. The State Water Board position on this matter is that Order 99-01, Permit 16584 and/or the service contract do not authorize such diversions. Consequently, the burden of proving the existence of a valid basis of right is on the District.

California Environmental Protection Agency

The regulation and storage of water, whether "temporary" or not, is defined in the California Code of Regulations (CCR) pursuant to the California Water Code Section 1058. CCR Section 657 refers to regulation of water and Section 658 refers to storage of water. CCR Section 657 states that:

Regulation of water means the direct diversion of water to a tank or reservoir in order that the water may be held for use at a rate other than the rate at which it may be conveniently diverted from its source. For licensing purposes, refill, in whole or in part, held in a tank or reservoir for less than 30 days shall be considered regulation of water.

CCR Section 658 states that:

Storage of water means the collection of water in a tank or reservoir during a time of higher stream flow which is held for use during a time of deficient stream flow. For licensing purposes all initial collections within the collection season plus refill, in whole or in part, held in a tank or reservoir for more than 30 days shall be considered water diverted for storage except as provided in Section 735(c).¹

Division staff will apply these regulations in its analysis of the operations at Hensley Lake to separate water being directly diverted, regulated and stored to determine the amounts of beneficial use under the Bureau's permit. If the District is exercising prior rights at Hensley Lake, these prior rights will need to be quantified and applied to the licensing analysis, which may reduce the storage and withdrawal amounts credited under the Bureau's permit.

Item 2 states that under Pre-1914 rights, the water right holder can change the point of diversion, place of use, or character of use provided that the legal water rights of others are not injured. The District's Pre-1914 direct diversion right at Franchi Dam may be converted to a storage right at Hensley Lake, provided that the legal water rights of others are not injured as stated by Ms. Brenner. However, to make such a change, the District should also demonstrate the following:

- It has written authorization from the Bureau and U.S. Army Corps of Engineers (Corps) to use the storage space at Hensley Lake under its prior rights;
- The combined rate of diversion, collection to storage and season of diversion at Franchi Dam and Hensley Lake will be the same or less than the District's historic continuous Pre-1914 water use so that the District does not initiate a new right; and
- It can maintain records quantifying the amount diverted under its Pre-1914 rights by source, including amounts directly diverted at Franchi Dam and amounts collected, regulated and withdrawn from Hensley Lake.

Item 3 states that the District's Soquel water supply is not diverted from the North Fork of Willow Creek (via the Soquel ditch) and turned into the Fresno River. A review of District's diversion records show that, since 2000, the District has not fully ceased using the Soquel ditch to import North Fork Willow Creek water into the Fresno River. Records show that diversions have occurred in six of the 108 months since 2000. The District should further clarify its diversion and use of water under its Pre-1914 claim covering the Soquel Ditch. The District can lose its Pre-1914 appropriative water right on the North Fork of Willow Creek if its diversion and use of water lapses for a period of five or more consecutive years.

¹ California Code of Regulations Section 735(c) refers to frost protection in the Napa River watershed.

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Item 4 states that there is no evidence, or can there be, of any injury to other water users resulting from the District's temporary storage of its Big Creek supplies. The Division cannot currently agree with this "no injury finding" because the District's exercise of prior rights in Hensley Lake may injure the designated uses for which Hensley Lake was constructed. The storage space in Hensley Lake under Permit 16584 may be unavailable to the Bureau and Corps because of storage by the District's Pre-1914 water.

Item 5 states that the low-flow outlet at Hidden Dam is inoperable such that the District's water cannot flow through the facility. The Division understands that the low-flow outlet pipe has been welded shut due to cavitation problems, but that the larger high-flow outlet pipe, which can bypass a minimum of 100 cubic feet per second, is operational. Water not authorized to be stored in Hensley Lake, either under Post-1914 or Pre-1914 rights, must be bypassed to downstream users. This bypass can be accomplished by using the high-flow outlet even if excess waters may have to be released in order to prevent unauthorized diversions.

If you have any questions, please contact Richard Satkowski of my staff at (916) 341-5439.

Sincerely,



John O'Hagan, Manager
Enforcement Program

cc:

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